What Happens When You Condense a Month (or Two) of the MediaLawDaily into a Single Article?

The Monthly Daily

An Ongoing Experiment in Drinking from the Firehose

By Jeff Hermes

The last time I witnessed a solar eclipse was when I was a senior in college. It was a partial eclipse, like this one was in New York. I distinctly remember the eerie thin light on a cloudless day, with crescent-shaped projections through the trees and the mesh of the screen window in my dorm room. The shadows were sharp, not diffuse as with cloud cover, and the sky was a dull Wedgwood blue. One tends to think of the sun as the bright spot, but you can forget how much light is refracted down to us through the atmosphere. It felt unreal, liminal. I can understand why some people scream involuntarily when full totality occurs, the veil that the sun casts over the earth is pulled back entirely, and you get a vertiginous glimpse of how we’re spinning through the universe stuck to the surface of a blue billiard ball. As Douglas Adams taught us, there’s nothing like a little dose of cosmic perspective.

Not so much in 2017, alas. Back in 1994, 84% of the sun was blocked where I was, versus a bit over 71% this time around. It made a difference. Besides, New York City is both a bit too solid to be rendered unreal and a bit too weird for mere celestial phenomena to render it more so. Still, wherever you were, I hope you enjoyed the show.

Rolling ever onward...

Supreme Court

Pending Cases

The briefing has begun in what’s likely to be among the biggest cases before the Supreme Court next term: Carpenter v. United States. The case about warrantless access to historic cell site information has the potential to rewrite Fourth Amendment and privacy law for the digital age, calling the third-party doctrine and other paradigms into question. I don’t know whether I
expect significant change to occur, but I’ve got that before-the-thunderstorm feeling about this one.

**Petitions**

Quite a few additional media-related matters have queued up for the Court’s consideration, including cases about: when the limitations clock starts for copyright claims; First Amendment protection for false speech in a political campaign; the survival of the “volitional conduct” requirement in copyright after Aereo; a court order blocking the publication of surreptitious video of abortion providers; the dismissal of a copyright lawsuit over 2014 film Walk of Shame; and whether “google” has become a generic term that has lost trademark protection.

**Miscellaneous**

Every Supreme Court opinion can have significant consequences, but the fallout from Matal v. Tam has been particularly noteworthy as individuals and companies have submitted a small deluge of applications for scandalous and disparaging trademarks to the U.S. Patent & Trademark Office. At least some of them appear to be attempts to lock up derogatory terms against others’ use, which are likely to fail (sooner or later) for lack of use in commerce.

For those of you wondering why the Supreme Court can’t manage to launch a PACER site, change is coming...slowly. The Court has unveiled a new website that can support “future digitization,” which sounds a lot like “one day, maybe” to me; of more interest are tools on the site to prevent link rot, i.e., the disappearance of online materials linked to in the Court’s opinions from the Internet. That’s actually a huge problem across a number of disciplines, in response to which several solutions have been developed (not the least of which are the Internet Archive and Perma.cc).

**Reporters’ Privilege**

Not unexpectably but definitely unfortunately, the Department of Justice under Jeff Sessions is undertaking a review of its guidelines for issuing subpoenas to the press. A media coalition met with the DOJ’s Public Affairs office to raise their concerns, but the whole matter is very much still unsettled.

Meanwhile, the plaintiff in a New York defamation case has caused a D.C. Superior Court subpoena to be issued to the Washington Post for information about the identity of a commenter on the popular “Volokh Conspiracy” blog. The plaintiff thinks there’s a connection
between the commenter and the author of defamatory comments on TheBlot.com, but, as Prof. Volokh points out, if New York law applies to the subpoena it seems likely that state’s shield law would protect the Post against having to disclose a commenter’s identity. (We’ll be hearing more about this particular case under Prior Restraint, below.)

Speaking of New York, Murray Energy Corp. was dealt a setback when the Appellate Division held that industry news service Reorg Research is protected by the state’s shield law. Reorg, which offers a pricey subscription email newsletter about debt-distressed companies, had refused to comply with a demand that it reveal the identities of sources for two articles about Murray; Murray had argued that any possible sources were subject to non-disclosure agreements and sought their identities to file contract actions.

In Illinois, the Journal & Topics Media Group is fighting a subpoena seeking to learn who told the paper about cops viewing porn on a department computer. And in Arizona, the state’s supreme court ruled that a journalist for the Arizona Republic did not have to disclose his notes relating to an interview with a crime victim to the attacker’s defense attorneys. The demand for the notes was rendered moot by the defendant’s guilty plea and subsequent life sentence.

**Defamation**

Well, the public doesn’t know the final number in ABC’s settlement of the pink slime case, but according to a Disney quarterly earnings report it appears to have been up to $177 million over and above applicable insurance coverage. I trust that the math made sense for the company, but still, ouch.

**New Cases**

A Florida church sued GuideStar and the Southern Poverty Law Center in M.D. Ala. for labeling it an anti-LGBT hate group, resulting in Amazon’s refusal to allow the ministry to raise funds through its charitable platform.

BuzzFeed was targeted with a new suit in D.D.C. from an immigration bond company; the suit alleges that BuzzFeed falsely accused the company of having been investigated by Immigrations and Customs Enforcement, when ICE lacks jurisdiction for such investigations.

In S.D.N.Y., a private investigator for a murdered Democratic National Committee staffer has alleged that Fox News defamed him in a retracted article by putting false statements
in his mouth, as part of an alleged conspiracy between Donald Trump and Fox to push a story that the deceased was killed for leaking information on Hillary Clinton to Wikileaks. And that’s another sentence I can’t believe I just typed.

In the District of North Dakota, the builder of the Dakota Access pipeline has sued Greenpeace for allegedly defaming the company as part of a **broad campaign to interfere with the project**.

In S.D. Ohio, The Daily Stormer is being sued for publishing an article claiming that a Muslim-American comedian admitted to **planning the May 2017 terrorist attack** in Manchester, England. **Serving the site’s publisher** has proved to be a problem with other lawsuits, though.

Parents of a Utah teen have sued the *Standard-Examiner* in D. Utah for defamation and false light over the **publication of their son’s mugshot** alongside his name and allegations against him in juvenile court. The alleged falsity seems to derive from implications the parents draw from references to the teen being “jailed” as opposed to merely taken in for fingerprinting and having not yet been convicted of any charges. If that sounds extremely weak, I agree with you.

In the states:

- In California, a Santa Clara politician sued alt-weekly *San Jose Inside* over an article **delving into his past relationships with women**.
- In Illinois, Crain’s Chicago Business was sued by a coffee shop owner **over a critical article**.
- In Iowa, an ex-police officer in Carroll sued the *Daily Times Herald* for an article alleging he resigned due to **relationships with underage women**.
- A fan of Atlanta United (that’s a soccer club, I guess?) sued Gizmodo Media Group in Georgia over a *Deadspin* article that **used his photo with an article about the team’s fans erupting into a homophobic chant**; the photo was allegedly not taken at the game where the chant occurred.
- In New York, Fox News host Eric Bolling served a “summons with notice,” which is apparently some form of pre-complaint procedure, on a Huffington Post journalist who reported on **accusations that Bolling sexted female colleagues**.
- Also in New York, a dealer in antiquities sued the *Wall Street Journal* over an article **linking him with funding being channeled to the Islamic State**.
- In South Carolina, a psychiatrist filed suit over **a one-star review** – and that’s all the review contained, just the single star.
• Speaking of lone stars, a Texas dentist sued a whole passel of national media outlets over reports regarding the *accidental death of a toddler under his care*.

*Plaintiff Wins*

Bad news for Mr. Nutterbutter – HBO’s [*removal of Bob Murray’s lawsuit*](https://www.marlawletter.com/2017-07-31/637515/170598?fbclid=IwAR14_7sB1w5QF2Se-G53xwXR7U7hyyn8S97w2F0-eoQXp64d_1e8Df) against John Oliver to the Northern District of West Virginia has been [*blocked for lack of diversity*](https://www.marlawletter.com/2017-07-31/637515/170598?fbclid=IwAR14_7sB1w5QF2Se-G53xwXR7U7hyyn8S97w2F0-eoQXp64d_1e8Df) between the corporate parties, and the case has been remanded to West Virginia district court. This is not to say HBO can’t get a fair shake in state court; although comparisons to ABC’s recent experience in South Dakota are likely, the underlying claims against HBO are so transparently frivolous that the forum hopefully won’t be too much of an issue. However, it does mean that the request to file a [*wonderfully acerbic amicus brief*](https://www.marlawletter.com/2017-07-31/637515/170598?fbclid=IwAR14_7sB1w5QF2Se-G53xwXR7U7hyyn8S97w2F0-eoQXp64d_1e8Df) filed by the ACLU of West Virginia Foundation is now moot; hopefully they’ll try again at the state level.

That wasn’t Murray’s only win in N.D. W. Va.; the same federal judge also [*denied The New York Times’ motion to dismiss*](https://www.marlawletter.com/2017-07-31/637515/170598?fbclid=IwAR14_7sB1w5QF2Se-G53xwXR7U7hyyn8S97w2F0-eoQXp64d_1e8Df) Murray’s separate defamation complaint against the paper, finding that Murray had adequately alleged falsity and actual malice. So maybe state court would be better after all (or at least not any worse).

The plaintiff in the case against BuzzFeed over the Trump Dossier in S.D. Fla. succeeded in persuading the judge to issue a request to the United Kingdom for the [*testimony of the former MI6 officer who created the Dossier*](https://www.marlawletter.com/2017-07-31/637515/170598?fbclid=IwAR14_7sB1w5QF2Se-G53xwXR7U7hyyn8S97w2F0-eoQXp64d_1e8Df); the judge also [*denied the UK ex-spy’s attempt*](https://www.marlawletter.com/2017-07-31/637515/170598?fbclid=IwAR14_7sB1w5QF2Se-G53xwXR7U7hyyn8S97w2F0-eoQXp64d_1e8Df) to intervene in the U.S. litigation to quash the request.

Pete Rose salvaged the heart of his claims against attorney John Dowd in E.D. Pa. over statements Dowd made in a radio interview [*accusing Rose of statutory rape*](https://www.marlawletter.com/2017-07-31/637515/170598?fbclid=IwAR14_7sB1w5QF2Se-G53xwXR7U7hyyn8S97w2F0-eoQXp64d_1e8Df). The court [*dismissed a tortious interference claim*](https://www.marlawletter.com/2017-07-31/637515/170598?fbclid=IwAR14_7sB1w5QF2Se-G53xwXR7U7hyyn8S97w2F0-eoQXp64d_1e8Df), but held that Rose had adequately pleaded a claim for defamation per se and allowed him to amend to allege special damages. [Photo: CC BY 2.0 Kjunstorm](https://www.marlawletter.com/2017-07-31/637515/170598?fbclid=IwAR14_7sB1w5QF2Se-G53xwXR7U7hyyn8S97w2F0-eoQXp64d_1e8Df)

A bankruptcy judge in S.D.N.Y. ruled that [*California’s anti-SLAPP law conflicts with the Federal Rules of Civil Procedure*](https://www.marlawletter.com/2017-07-31/637515/170598?fbclid=IwAR14_7sB1w5QF2Se-G53xwXR7U7hyyn8S97w2F0-eoQXp64d_1e8Df), and has refused to apply it to claims in Gawker’s bankruptcy. One of many, many reasons I am looking forward to the end of Trump’s presidency is so that we can get back to working on the federal anti-SLAPP bill.

An internet marketer accused of e-mail spamming won the right to conduct discovery to support [*personal jurisdiction over media defendants*](https://www.marlawletter.com/2017-07-31/637515/170598?fbclid=IwAR14_7sB1w5QF2Se-G53xwXR7U7hyyn8S97w2F0-eoQXp64d_1e8Df) in E.D. Wash., defeating a motion to dismiss (though leave was granted to the defendants to refile the motion later).

James Woods has finally let go of that California lawsuit over a [*tweet referring to him as a cocaine addict*](https://www.marlawletter.com/2017-07-31/637515/170598?fbclid=IwAR14_7sB1w5QF2Se-G53xwXR7U7hyyn8S97w2F0-eoQXp64d_1e8Df) after a settlement that includes a letter of apology on behalf of the deceased...
defendant from his attorney. Meanwhile, Newsweek settled a case in New York brought by a journalist who had alleged that an article by Kurt Eichenwald accused him of being a sock puppet for Russia.

We also had two seven-figure jury verdicts. First, a Dallas wedding photographer was awarded $1.08 million in compensation for a dissatisfied couple’s online vengeance. Second, a former Army colonel who had his promotion to brigadier general revoked was awarded $8.4 million by a Virginia jury over allegations of rape that were determined to be false (though the award includes substantial punitive damages that are likely to be capped under state law).

On appeal, the Fifth Circuit held that qualified immunity blocked a plaintiff from pursuing a Section 1983 claim in response to arrest warrants issued on patently frivolous allegations of criminal libel; the plaintiff had voluntarily surrendered to authorities, and it was not clearly established at the time (though the Court held it is now) that holding someone who surrenders to arrest on obviously flawed charges is a constitutional violation. The Fifth Circuit also reversed the dismissal of an economics professor’s lawsuit over a New York Times article saying that he described slavery as “not so bad,” finding that the prof’s allegation that he was quoted out of context could support a defamation claim.

The California Court of Appeal reversed the dismissal of claims by a software company against the anonymous authors of critical posts on Glassdoor. An Indiana appellate panel held that a doctor who reported medical child abuse to the state’s Department of Child Services was not protected by Indiana’s anti-SLAPP law (in a holding which is making me weep in my metaphorical beer for its idiocy). In Massachusetts, an appellate court upheld a $2.9 million verdict in favor of a former Chelmsford selectman against a resident of the town who accused him of underhanded political dealings in his real estate practice. And in Texas, an appellate panel upheld the denial of singer Erykah Badu’s anti-SLAPP motion on a defamation suit by an ex-employee over social media posts.[Photo: CC BY-SA 3.0 Radiobums]

Defense Wins

Good news for The New York Times – the court dismissed Sarah Palin’s complaint in S.D.N.Y. against the paper over an editorial allegedly linking a political ad by Palin’s PAC to the attack on Rep. Gabby Giffords. The Times’ Rule 12(b)(6) motion to dismiss took an unusual turn when Judge Rakoff ordered the author of the editorial to testify about his knowledge of reports debunking such a link (including an earlier article in the Times itself); the hearing raised the interesting procedural question of whether the Iqbal/Twombly standard allows for evidentiary
hearings on “plausibility.” As expected, the *Times’ witness testified* that the paper did not intend to blame Palin for the shooting but that he was also unaware before the editorial was published that such a connection had been debunked.

From my perspective, I’m glad the *Times* won—I think it was the right result—but the idea of holding plausibility hearings on 12(b)(6) motions is, frankly, bonkers. I read *Iqbal* as saying that the facts pleaded in a complaint need to be more than merely consistent with an entitlement to relief; rather, the complaint must plead sufficient facts to exclude non-actionable interpretations of the defendants’ actions:

The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. ... Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). There is no need for evidence under that standard.

The traditional way to address the problem Judge Rakoff perceived would have been to dismiss Palin’s complaint with leave to amend, to see if she could remedy the deficiencies identified by the court: if not, case dismissed; if so, on to discovery and summary judgment on a full record. Effectively, Judge Rakoff created something akin to an anti-SLAPP procedure to achieve early resolution of a First Amendment case that he thought was probably going nowhere. That’s a fine notion, and certainly a federal anti-SLAPP law would have assisted in this case. But “plausibility” hearings just undermine the value of Rule 12(b)(6) to get rid of complaints that are deficient on their face.

We saw a win for docudrama producers in N.D. Ala., with summary judgment in favor of the Discovery Channel on a NASA scientist’s claim that he was defamed by embellished or fictionalized scenes in a production about the 1986 Challenger explosion; the court found no actual malice. Discovery scored another win in D. Md., defeating a claim over social media posts allegedly made by one of the network’s reality TV stars on the basis that the star’s statements could not be attributed to the network. (Who needs reality TV when you have defamation lawsuits, anyway?) Also in D. Md., blogger and prosecuting attorney Patrick Frey defeated a Section 1983 lawsuit over a blog post about the plaintiff’s criminal history, with the court holding that he was not acting under color of state law when he published the allegedly defamatory statements.

Plaintiffs in N.D. Fla. were unable to plead around the limitations on voluntarily dismissed defamation claims against Twin City News by recasting them as tortious interference
claims. In E.D. La., a Section 1983 plaintiff defeated a motion to dismiss his claim that the execution of a search warrant in furtherance of a meritless criminal defamation investigation violated his civil rights.

The Observer-Dispatch fought off a case in N.D.N.Y. from a man who was arrested and convicted on drug charges but later released over a Brady violation; the paper won a motion to dismiss on the basis of the fair report privilege. The Daily News also picked up two fair report wins in New York: in S.D.N.Y., over an article about a lawyer who “feigned an assault” during a divorce hearing; and in state court, over an article about a lawsuit brought against a bridge and scaffolding company by the NYC Housing Authority.

Meanwhile, the Wall Street Journal escaped liability in a lawsuit filed in S.D.N.Y. by the former head of the Venezuelan National Assembly over an article stating he was being investigated for drug trafficking by U.S. authorities.

In California, cartoonist Ted Rall’s defamation complaint against Tribune Media in connection with his termination fell to an anti-SLAPP motion, and a judge issued a tentative ruling dismissing Richard Simmons’ complaint against American Media over a report that he is transitioning to female on the basis that the claim is not defamatory. In Minnesota, a jury held that a former police sergeant had not defamed a man arrested for (but never charged with) a cop slaying in online posts. In Tennessee, a weird lawsuit between the former and current directors of a culinary school was dismissed for lack of statements that could be interpreted as defamatory. In Texas, an animal sanctuary found itself on the wrong end of an anti-SLAPP ruling after it sued Facebook critics, looking at a total of $159,000 in fees and sanctions. In Virginia, a lack of actual malice doomed a Hanover County supervisor’s lawsuit against Style Weekly over an article alleging that he attempted to stifle perceived liberal ideology at Hanover High School.

And—check your bingo cards, folks—in Wyoming, a judge found no actual malice in a defamation case between two former state officials over a response made by the defendant to a journalist’s question during a political campaign. That’s right, a defamation decision from Wyoming. The chapter in our 50-State Survey just doubled in length.

On appeal, the Second Circuit held that NBC’s Today did not defame a sporting goods manufacturer by referring to one of the company’s exploding rifle targets as a “bomb,” finding that the plaintiff failed to plead facts to indicate that characterization was substantially false. And in Indiana, the court held that its anti-SLAPP law does apply to a politician’s campaign flyers, making it good for something, I suppose.
New & Pending Appeals

Cheryl Jacobus’ opening brief in her attempt to revive a defamation lawsuit against Donald Trump and Corey Lewandowski has dropped in New York’s appellate division. The brief seeks to persuade the court that statements made by Trump and his subordinates on talk shows and Twitter were factual in nature, and not transformed into opinion solely by the forum in which they were issued.

Miscellaneous

The Electronic Frontier Foundation has filed a lawsuit in N.D. Cal., invoking the 2010 SPEECH Act to block the enforcement of a South Australian court’s defamation injunction against EFF’s “Stupid Patent of the Month” feature.

Privacy

Rights of Publicity

In new cases, the son of Thelonious Monk sued a brewery in N.D. Cal. over its “Brother Thelonious Belgian Style Abbey Ale,” alleging violations of California’s right of publicity alongside the requisite trademark claims. Retired wrestler Billy Two Rivers sued Van Morrison in S.D.N.Y. for using Rivers’ photograph on Morrison’s latest album cover without permission. In the same court, ex-Roots percussionist Frank “Knuckles” Walker has sued the band over their continued use of his likeness in its promotions. In S.D. Ohio, famed Ohio State alumnus Chris Spielman has sued the university, on behalf of a putative class of current and former Buckeyes football players whose likenesses were allegedly used without authorization in Ohio Stadium and on a range of merchandise.

Maybe he’ll have better luck than football players did in N.D. Cal. this month, where an ROP claim was knocked out of a lawsuit against Electronic Arts over its “Madden” series of games after the court found that characters in the game were not identifiable as specific players. In N.D. Ill., an Illinois publicity rights claim was dismissed against online advertisers who inserted names used as search terms (on Google, Bing, and the like) into ads targeted at the user conducting the search.

And in a closely watched case, a right of publicity claim against Facebook was tossed by the California Court of Appeal. The lower court had split from Ninth Circuit precedent in holding that a state ROP claim against Facebook based on user-generated content was not barred
by Section 230; the appellate court did not address that question, but nevertheless held that the claim failed on its merits.

In S.D. Fla., the advertising company behind a Miami sex club’s promotional activity failed to escape a third-party claim filed by the club, in case brought by female models against the club over its use of their images in advertising.

Finally, Olivia de Havilland has moved to accelerate the trial of her claim against FX over her portrayal in a recent docudrama about the feud between Bette Davis and Joan Crawford. She has invoked a California statute permitting litigants over 70 years of age to ask for litigation to be expedited. Her case will need to survive FX’s motion to strike first, though.

**Disclosure of Private Information**

Former reality TV personality Josh Duggar has filed suit in W.D. Ark. against the publishers of In Touch Weekly for their disclosure of reports that he sexually molested his sisters when they were children. If that one doesn’t seem like enough of a longshot, a group of donors to the Democratic National Committee have sued Roger Stone and the Trump campaign in D.D.C., alleging that the Trump team’s participation in the Russian hack of the DNC resulted in disclosure of their personal info on Wikileaks. [Photo: CC BY-SA 2.0 Lizzie Ochoa]

And in E.D. Pa., Aetna is facing a privacy lawsuit over its inadvertent disclosure of patients’ HIV status by mailing letters regarding prescription drugs in envelopes with clear windows large enough to reveal the contents. In a further irony, the letters concerned the results of an unrelated privacy settlement. There isn’t a palm large enough for the face on this one.

**False Light**

In Missouri, a married couple from Independence has sued a local TV station over a news report depicting them as victims of a man who duped women into having sex on camera, suggesting that the report falsely suggested that the wife was willing to have sex for cash with the husband’s consent.

**Intrusion**

Dish Network is looking at some large numbers in Telephone Consumer Protection Act verdicts, with a $280 million judgment against the company in C.D. Ill. and $61 million in M.D.N.C.; the former survived a post-judgment challenge, while Dish will have the right to
challenge the right of individual claimants to recovery with respect to the latter (potentially reducing its total liability).

Meanwhile, Facebook avoided liability in a class action for security notification text messages, with a judge in N.D. Cal. ruling that a decision by the Ninth Circuit on another case involving Facebook was inapplicable to his decision to dismiss the case at bar. In E.D. Mo., a jury tossed out a class action against the producers of movie Last Ounce of Courage for a robocall campaign featuring the voice of Mike Huckabee.

Wiretapping/Eavesdropping

The Eleventh Circuit ruled that a Florida man did not violate the state’s wiretapping law by secretly recording a meeting with the Chief of the Homestead Police Department, because there was no expectation of privacy expressed with respect to the meeting. A dissenting judge believed the court should have reached the question of whether the First Amendment protected the recording.

Not so fortunate was a Hollywood private investigator, whose 15-year sentence for serial wiretapping and related skullduggery was upheld by a federal judge in the Central District of California.

Access/FOIA

New Cases

The usual crop from D.D.C.: the Washington Post sued the DOJ for documents relating to its investigation of opioids being diverted to the black market from legal channels; the editor of Lawfare sued the DOJ to confirm that no records exist to support Donald Trump’s statement that, according to DOJ data, most terrorists convicted since 9/11 are from outside the U.S.; Public Citizen sued the Secret Service for visitor logs to FOIA-subject agencies in the White House complex; the Reporters Committee for Freedom of the Press sued the DOJ and the FBI for records about federal agents’ impersonation of documentary filmmakers; and a nonprofit group sued the FCC for records detailing its communications with ISPs in the run-up to the attempted repeal of the 2015 Open Internet Order.

Another net neutrality-related FOIA suit was filed in E.D.N.Y., with an independent journalist seeking records from the FCC on (1) the alleged DDoS attack that took down the agency’s comment system and (2) spamming of the system with fake comments.
In S.D.N.Y., Gizmodo has filed suit against the FBI demanding access to its file on Roger Ailes; the Brennan Center for Justice has sued the DOJ for records on Donald Trump’s commission to investigate his fevered imaginings about voter fraud; and The New York Times has sued the CIA for records related to a program to fund payments to Syrian rebels that Trump claims to have ended.

A reporter at Radio Free Europe wants to know what happened to a former aide to Vladimir Putin found dead in the United States, suing D.C.’s medical examiner for access to the autopsy report. The author of the blog NM Fishbowl has sued Lobo Sports Properties in New Mexico for records relating to sponsorship of the University of New Mexico Stadium; he’s claiming the private company has custody of university records subject to the state’s public records law. And in Texas, an activist has sued alleging that she was unlawfully excluded from a House committee hearing.

Access Granted

Here’s an interesting ruling from the D.C. Circuit: A criminal defendant may not waive FOIA rights with respect to his or her own case as part of a plea bargain, because there is no “legitimate criminal-justice interest” served by requiring such a waiver. In particular, the Court of Appeals held that while blocking a defendant from using FOIA to find exculpatory evidence that could draw out a criminal case might speed up cases, that was not a legitimate interest.

The Ninth Circuit held that the First Amendment Coalition was entitled to its fees in its successful quest for legal memoranda regarding the U.S. government’s missile strike against U.S. citizen Anwar al-Awlaki, and in another case that the CIA must make a good faith attempt to interpret a request for records that are not properly defined.

In D.D.C., we’ve got Judicial Watch scoring an order to the State Department to search state.gov email accounts for Benghazi-related emails; an order expediting the Defense Department’s response to a request for documents about the missile strikes on Syria in April; the FBI smacked back after it proposed a 17-year schedule for turning over records about surveillance of activists during the ‘60s and ‘70s; and an order that the FBI release documents on efforts to purge gay employees from the federal government in the ‘50s.

In N.D. Cal., a magistrate judge indicated that she would order multiple federal departments to accelerate their release of records related to Trump’s travel ban if they did not do it voluntarily. In S.D.N.Y., the Secret Service was ordered to turn over records of visitors received by Donald Trump at Mar-a-Lago. In the same court, a federal judge declared an end to
the broad redaction and sealing of documents in a case that is now known to involve a claim against former Fox News commentator Andrea Tantaros over a ghost writing agreement for her book “Tied Up in Knots.” A judge in E.D. Va. also rejected efforts to keep a case under seal, holding that blocking public access to the dispute between a Qatari diplomat and a domestic servant over “intolerable” working conditions would violate common law and constitutional rights of access.

In Arkansas, a circuit judge held that the privately incorporated Arkansas Children’s Hospital is subject to state FOIA due to its receipt of funding from county property taxes. In Michigan, a judge granted summary judgment in favor of ESPN on a lawsuit by Michigan State University to block the network’s FOIA requests, holding that a public body does not have a cause of action against a requestor.

Arizona’s AG issued an opinion that records of official business stored on personal devices and reflected in social media communications are subject to the state public records law. Massachusetts’ supervisor of public records said the same with respect to a Commonwealth employee’s web browsing history (as hundreds of government officials in the Bay State simultaneously turn on private browsing mode and invest in VPNs for “security reasons”). And Pennsylvania’s Office of Open Records issued a ruling that a public official’s Facebook page is subject to the state’s Right to Know Law.

The North Carolina Governor’s Office settled a claim with a media coalition over serial violations of public records laws under former Gov. Pat McCrory, with an agreement not to charge unlawful fees, aspire to prompt responses, avoid discriminating among requesters, and more. The New Jersey Supreme Court ordered the disclosure of dash-cam footage and unredacted reports about a fatal police shooting in 2014, while the state’s Appellate Division revived a media lawsuit targeting infamous beachgoer Chris Christie’s emails about Bridgegate. The New York Times won an order in New York state court directing Gov. Andrew Cuomo’s office to release documents related to a corruption investigation into rigged bids for development in Buffalo. Finally, a Pennsylvania judge ordered a school bus video of a parent-student scuffle to be released, ruling that it was not an educational record under the Family Educational Rights and Privacy Act.

Access Denied

The Seventh Circuit ruled that the FBI did not have to release either the names of Chicago PD officers investigated but not charged in connection with a protection racket (as to
which two other cops were convicted) or the names of the FBI agents who worked on the investigation. Similarly, the D.C. Circuit held that an FBI agent’s illegal sharing of information with a mob informant did not waive the law enforcement exemption applicable to that information under FOIA.

In D.D.C., a judge rejected the Electronic Privacy Information Center’s effort to pry Trump’s tax returns out of the IRS, finding that the court lacked the authority to order the release of those documents without either Trump’s or Congress’ permission.

The Virginia Supreme Court held that the state’s Bureau of Financial Institutions could withhold financial reports filed by car title lenders, while the state’s district court held that judges did not constitute a “public body” under state FOIA.

Pending Cases & Appeals

The ACLU filed its appellants’ brief at the Second Circuit after its attempt to force the DOJ to disclose more information about drone strikes in Pakistan was rejected by a lower court. Also in the Second Circuit, Alan Dershowitz filed a scathing brief as an intervenor-appellant in the Giuffre v. Maxwell defamation case to challenge the district court’s broad order sealing the record. In the Ninth Circuit, a national media coalition threw its support behind Courthouse News in a fight over timely access to California state court records.

A case brought by the news media to obtain access to information about death penalty drug suppliers and the qualifications of executioners went to a bench trial in the District of Arizona in late July. The judge’s decision is, as of this writing, still pending.

Legislation

A new U.S. Senate bill would subject private prisons to the Freedom of Information Act.

A California Assembly Bill was introduced to require the release of police body-cam video in cases of public interest, and has cleared a Senate committee. On the other hand, Michigan Gov. Rick Snyder, as expected, signed a law limiting access to body-cam footage, while Pennsylvania Gov. Tom Wolf signed a law exempting police audio and video recordings from disclosure if it is not possible to remove or obscure (a) the identities of confidential informants and victims or (b) the evidence in a criminal or administrative investigation.

Miscellaneous

Minnesota’s Supreme Court has decided to livestream its hearings, and Wisconsin’s Department of Justice has started to publish a list of pending records requests on its website (and is looking into publishing responses to requests as well). Good for them.
Newsgathering

Prosecution of Journalists

After the flap back in June when Senate Republicans briefly told the press they couldn’t film in the halls of the Capitol, one would have thought that the Hill would have given a bit more thought to shutting down photojournalists. Alas no, as Capitol Hill police in July ordered photogs to delete their images of a protest in the Senate visitor galleries over the effort to repeal the Affordable Care Act. While photographers are barred from taking photos in certain areas as a condition of their press credentials, press freedom groups decried the order to delete photos as a violation of the photographers’ constitutional rights.

We also had mixed messages (big surprise) from the Trump Administration this month as Jeff Sessions’ DOJ ramped up its investigations into leaks with broad statements that suggested reporters were not off the table as targets. Deputy AG Rod Rosenstein subsequently gave vague assurances that the Department wasn’t focused on journalists, but wouldn’t rule out prosecuting journalists if they were purposefully violating the law. So that means...what, exactly?

Punishment of Sources

Well, for sources within the federal government it means that there are rough times ahead. The DOJ has tripled the number of leak probes, with the support of a Senate GOP report, and agencies are attempting to identify leakers in their midst. Reality Winner now has the benefit of financial assistance from the Intercept for her legal defense, but she faces an uphill battle. And the Senate intelligence committee wants Wikileaks to be declared a “non-state hostile intelligence service.”

In other news, the U.S. government was let off the hook for damages allegedly suffered by the son of convicted ex-U.S. Rep. Chaka Fattah after law enforcement leaked information to the press; a judge in E.D. Pa. held that the harm Junior suffered was of his own making. Meanwhile, an Ohio appellate panel shredded an order for $11,000 in sanctions against a lawyer for talking to the press about a case, holding that his speech was protected by the First Amendment.

Trump Administration

There’s been no change in Trump’s attitude toward the press, and Generalissimo Francisco Franco is still dead. Of course there were Trump’s own screeds, with his recent appearance in Arizona a particularly despicable lowlight. The White House also tried to get the
White House Correspondents’ Association to publicly condemn Politico reporter Tara Palmieri, which the WHCA of course declined to do. Trump’s disdain for independent oversight was more successful in inspiring his supporters to trash CNN’s mobile app with one-star reviews, which kind of sums up the level of his discourse on the subject.

The Knight First Amendment Institute went ahead and filed its lawsuit against Trump against his blocking of Twitter followers, including a motion for a preliminary injunction. Naturally, the White House is resisting any constraint on the one activity that Trump actually appears to enjoy in his current position. Fortuitously, the Institute received some help in its effort from a decision in E.D. Va. that the Chair of the Loudoun County Board of Supervisors violated a citizen’s First Amendment rights by blocking his access to her Facebook page for 12 hours. I personally still think that the technical differences between a Facebook page and a Twitter account at least need to be considered before a ruling like this can be applied to the Institute’s case, but I’m softening a bit on my opinion of the suit’s likelihood of success.

(Meanwhile, the governors of Maine, Kentucky and Maryland are all facing ACLU legal challenges for blocking critics on social media, while Michigan government Twitter accounts have apparently blocked hundreds of handles – including, ironically, @POTUS.)

If you’ve been keeping score, Trump is now at a 64-year presidential low for solo press conferences, evidently preferring rallies where his increasingly isolated followers simply accept his lies. When he does talk to actual reporters, he’s got a habit of going on and off the record so capriciously that one correspondent likened his behavior to an attempt to demand quote approval.

There was also pushback against a ban on televising press briefings, with the WHCA protesting the move and a (largely symbolic) House bill introduced that would require at least two on-camera briefings per week. That ban lasted until Anthony Scaramucci...

Oh, right. The Mooch. Well, we all knew Spicer wouldn’t be around much longer, and the smart money was on Sarah Huckabee Sanders taking over the podium when the dust settled, but even in the demented world of Donald Trump who could have imagined what happened in the interim? I don’t know about you, but I certainly didn’t have “Hires a Futurama character as his new communications director and fires him 10 days later” in my office pool.
Lawsuits

Hey, how about some wins in court to make you feel better? The Third Circuit has finally recognized a First Amendment right to record the police, bringing it in line with the First, Fifth, Seventh, Ninth, and Eleventh Circuits. That means that the only surviving federal appellate decision explicitly finding no clearly established right to record is an unpublished ruling from the Fourth Circuit. Next up, the Second Circuit.

Meanwhile, the Ninth Circuit held that a wildlife activist had a First Amendment right to observe government agents herding wild bison in Yellowstone National Park, and the District of Utah held that the state’s ag-gag law banning secret recordings of farm and slaughterhouse operations was unconstitutional.

Credentials

The White House Correspondents’ Association tightened its membership rules, limiting membership to journalists already approved for a congressional press credential. Reporters for Breitbart and Mother Jones were excluded as a result; the move affects eligibility for reporters’ pools and participation in WHCA governance.

Meanwhile, a federal district judge in Massachusetts threatened to yank press credentials from a reporter for Deadline who, the judge claimed, “stalked” prospective jurors after they were released from service in a trial of Teamsters charged with extorting the production staff of Top Chef. The reporter claims he quietly spoke with dismissed jurors who talked to him voluntarily.

Drones

Those wishing to use drones to cover breaking events might have some help from the FAA, which states that later this year it will start issuing “instant authorization” for flights in controlled airspace. However, a coalition of media organizations (including the MLRC) has filed comments with the FAA regarding potential interference with journalism from contemplated regulations regarding the remote identification and tracking of drones.

Prior Restraint

The Ninth Circuit held that the statutory scheme of National Security Letter gag orders, as amended by the USA FREEDOM Act of 2015, survives strict scrutiny as a scheme of prior restraints (while questioning whether they are prior restraints at all). The decision is in tension with another recent ruling from the Northern District of California, which denied summary judgment to the U.S. government on Twitter’s claim that the government’s classification of the mere fact of receipt of NSL letters and FISA orders amounts to an unconstitutional prior
restraint. I wrote an article on these two cases for the July Law Letter, if you’re interested in the gory details. Meanwhile, Automattic has released another five unsealed NSL letters under the expedited review process of the USA FREEDOM Act.

A judge in N.D. Cal. has held a pro-life activist and his attorneys in contempt for violating a preliminary injunction against publishing videos that were surreptitiously recorded in closed-door meetings of the National Abortion Federation; the videos are the subject of a lawsuit brought by the Foundation alleging that they were filmed in violation of non-disclosure agreements.

In S.D.N.Y., a judge has blocked the making of a film about the plane crash that killed Lynyrd Skynyrd band members Ronnie Van Zant and Steve Gaines, holding that former member Artimus Pyle’s participation in the production violated a consent order entered into by surviving members following an earlier dispute over use of the band’s name.

In California state court, competition for a city council seat led one candidate to present the other’s social media posts to a court out of context in order to obtain a TRO against further criticism. The ban on blogging was subsequently lifted, though a physical stay-away order remains in place. Speaking of lifting prior restraints on bloggers, a Florida appellate panel reversed an order banning a man from blogging about his condo association.

Less luck in the courts of New York, where a presidential nominee to the Commodity Futures Trading Commission sued online tabloid The Blot for defamation. A series of articles accused the nominee, among other things, of figuratively “lynching” two stockbrokers as an adjudicator for the Financial Industry Regulatory Authority by banning the pair from associating with FINRA-regulated firms. Not only did the trial court issue a preliminary injunction against The Blot to remove all articles about the plaintiff, it also banned The Blot from posting any further articles about the plaintiff for the duration of the case.

What’s more, a piece of the injunction survived review. The Appellate Division tweaked the order so that mostly focuses on threats and incitement, but it also directs The Blot to remove “images ... which depict ... lynching” and prohibits them from posting “any photographs or other images depicting ... lynching in association with plaintiff.” True, the articles are a racist screed that focuses on the plaintiff’s skin color. Despite the fact that the plaintiff is portrayed as the “lyncher” rather than the “lynchee,” a reasonable reader could understand the use of the imagery of a lynching (including a picture of a black man hanging from a tree) as a veiled suggestion of what should happen to the plaintiff. But a prior restraint before adjudication of the constitutionality of the speech is problematic, as is the breadth of even the modified order.
Meanwhile, a judge in Washington Municipal Court has issued an order banning a man from using a local activist’s photo in “memes, posters, or other online uses,” and prohibiting him from using the activist’s name or identifying information in the title or domain name of any “websites, Facebook pages, blogs, forums, or other online entities.” There were no findings of threats, falsity, or any other basis for the order other than the evident animosity between the parties.

**Information Infrastructure**

*Federal Communications Commission*

The FCC is back up to five commissioners, with Democrat Jessica Rosenworcel and Republican Brendan Carr confirmed by the Senate, while Chair Ajit Pai, Michael O’Rielly and Mignon Clyburn testified at the FCC’s first oversight hearing this year before the House Commerce subcommittee on technology. Pai also appeared before the Senate Committee on Commerce, where he denied knowledge of any efforts by the White House to communicate with the FCC or to leverage the agency to attack the press.

The biggest issue on the FCC docket remains net neutrality, which we’ll talk about separately below, but there are also reports from within the industry that Pai is preparing a proposed order that would allow newspaper/broadcast and radio/TV cross-ownership. Meanwhile, PBS and NPR have asked the agency to reevaluate its rules on indecency, and Microsoft has asked the FCC to reserve a “white space” channel in every market for broadband expansion (much to the consternation of broadcasters).

The agency also racked up a couple of notable wins in court, including a ruling in D.D.C. upholding an FCC finding that cable is subject to national competition and an opinion from the D.C. Circuit rejecting FCC orders that could shut down low-power TV stations as time barred. However, the D.C. Circuit held that the FCC might have incorrectly penalized participants in a wireless spectrum auction by disqualifying them for small business credits and fining them almost $500 million after, as a result of the disqualification, they couldn’t afford to purchase all of the spectrum they had won. In addition, the Sixth Circuit held that the FCC had not adequately explained its reasons for banning local authorities from regulating non-telecom services provided by cable operators under the mixed-use rule (though it remanded to allow the agency to try again).
Net Neutrality

So, the "Day of Action" coordinated by pro-net neutrality activists was held on July 12th. Raise your hand if you noticed.

That’s not to say that demonstrations like these can’t be effective, or the opposition to Ajit Pai’s plan to roll back the 2015 Open Internet Order isn’t widespread and vocal. From premium content publishers to engineers and technical experts, there are many voices saying that net neutrality is critical. In fact, the FCC added a couple of weeks to the comment period, which ended August 30 instead of August 16 with at least 21.9 comments filed, and 98.5% of unique (i.e., not spam or form letter) comments opposing repeal. However, the agency is putting up resistance to releasing the text of about 47,000 informal complaints filed under the 2015 Order, which one might consider to be important data when articulating why repealing the Order is or is not a good idea. (The only formal net neutrality complaint, against Verizon, has apparently languished untouched by the agency since it was filed in July 2016; the complainant filed another request this July that the FCC address the matter.)

Sen. Ron Wyden of Oregon maintains his leading role as an advocate for digital liberty on Capitol Hill, showing particular ire at what he perceived as Chairman Pai’s taking his comments out of context to make it sound like they supported a repeal. He also took aim at the FCC for its refusal to disclose its analysis of the DDoS attack that the agency claimed took down its comment system. The FCC separately denied a FOIA request for records of that analysis, claiming that no written records were created. (Other FOIA-related matters concerning the FCC and the Open Internet Order were discussed above under Access/FOIA.) Sen. Wyden wasn’t alone, of course, in challenging the repeal in Congress, as a number of other Democrats in Congress voiced their objections.

The White House has thrown its shuddering bulk behind Pai’s efforts, however, and the Republican-led House Energy & Commerce Committee tried to put chief executives for major tech companies in a bind by summoning them to a hearing on net neutrality in early September. The dilemma: go, and face questioning on who-knows-what, or decline, and be declared to have waived any interest in shaping net neutrality legislation. So far, the tech companies haven’t committed either way.

The ISPs, meanwhile, are looking for additional time to file a petition for certiorari to the U.S. Supreme Court on the D.C. Circuit’s ruling supporting the Wheeler-era FCC’s interpretation of Title II; if the Supremes flip the Court of Appeals, the whole debate over the 2015 Order becomes largely moot.
Mergers & Antitrust

After much speculation and opposition from interested parties, it looks like the AT&T/Time Warner merger is moving forward at the DOJ. Meanwhile, Fox News has settled its dispute with Charter Communications arising out of the 2016 merger of Charter and Time Warner Cable.

Sinclair’s merger with Tribune Media is facing numerous challenges, including shareholder lawsuits in D. Del. and N.D. Ill., a demand for delay from Newsmax Media, a plea from Dish Network to the FCC to block the merger, House Democrats leaning on the agency for what they view as easy treatment of Sinclair, and the DOJ pressing for more information. (Democrats in Congress have also begun talking about antitrust reform in the communications industry as part of their platform generally, though of course that’s not likely to happen any time in the near future.) Sinclair has filed an objection to the FCC petitions. Meanwhile, 21st Century Fox seems to be scooping out its options for life without Sinclair as an affiliate partner.

Finally, the Second Circuit shut down suits filed by two e-book retailers claiming that Apple’s price-fixing scheme (which resulted in a hefty fine) drove them out of business.

Other Litigation

Two sports-related matters from New York: In S.D.N.Y., Dish Network has sued Univision for allegedly undercutting their deal for soccer broadcasts by streaming matches on Facebook; and in state court, an appellate panel tossed out an arbitration award between the Baltimore Orioles and Washington Nationals over the value of baseball broadcasts due to a lack of impartiality in the arbitration process, and remanded for re-arbitration.

Digital Content

Takedown Mania

It’s been a while since I’ve heard about the Church of Scientology in the media law context (anti-SLAPP laws are a wonderful thing), but that might just be because its defenders have decided to skip the whole court process altogether. Four forged court orders from 2016 were recently discovered among submissions to Google, all directed at online content critical of Scientology’s Narconon anti-drug program.

Meanwhile, in Ohio we have another occurrence of the rare “Recursive Streisand,” where a bogus takedown request spawns critical commentary which spawns another bogus takedown
request spawning even more critical commentary. Here it’s Prof. Volokh whose article about a person convicted of contempt for forging libel injunctions resulted in another forged request to Google to remove the article, about which the professor naturally wrote.

Finally, in Maryland the Baltimore City Circuit Court vacated a takedown order issued against a fictitious defendant.

Section 230

The big news this time around is the “Stop Enabling Sex Traffickers Act of 2016,” or SESTA, a Senate move to amend Section 230 and federal trafficking laws to make it easier to go after online platforms alleged to support sex trafficking. The bill has broad bipartisan support. Eric Goldman and Daphne Keller break it down in detail, but in a bombshell the bill: (1) expands federal civil and criminal liability to platforms who “participate in a venture” with reckless disregard of the fact that the venture supports certain forms of sex trafficking; and (2) creates a new exception to Section 230 for criminal or civil claims based on such activity, at either the federal or state level (although state claims may not penalize intermediaries for conduct that federal law does not reach). So, you know, no potential mischief there at all.

Meanwhile, in California the Attorney General’s Office has managed to get criminal charges against Backpage.com over the first hurdle, with money-laundering charges surviving a motion to dismiss (though other charges failed to evade Section 230). Whether that affects legislative interest in SESTA is anyone’s guess; I sort of doubt the existence of this workaround for Backpage, which is reminiscent of bagging Al Capone for tax evasion, will satisfy Congress. Backpage has also sued to block a demand from the Missouri AG for information that the company possesses about trafficking on its website, on the basis that Section 230 blocks states from taking any action; that argument would evaporate if SESTA passes.

On the other hand, we had Section 230 wins in: the District of Massachusetts, with VRBO.com fighting off a claim about a fraudulent rental listing; the Southern District of Texas, where Facebook was let off the hook for not deleting user comments; and the California Court of Appeal, which affirmed Yahoo!’s anti-SLAPP win on a claim based on anonymous user comments. And there was an interesting decision from the District of Utah that combined analysis of Section 230, defamation, and alleged extortion in the context of a product review website that allegedly strong-armed companies into becoming paying members. The court’s decision is analytically fairly careful, even if it draws lines between the defendants’ conduct and that of their users in a way that is open to disagreement.
In other Section 230 news, a Mississippi appellate panel rejected a bizarre attempt to turn Section 230(c)(2) into an affirmative obligation to remove offensive anonymous comments on a blog post.

**Hate, Terror, and Other Internet Nastiness**

New Jersey has banned websites that charge to remove embarrassing content from the Internet, in a move to stem the mugshot racket; the new law focuses on the demand for compensation for removal, and not the publication of information. Meanwhile, a new lawsuit in W.D. Wash. challenges a Washington cyber-harassment law, and the Eighth Circuit has held that federal stalking laws may be constitutionally applied to a man who attempted to extort an apology from his ex-girlfriend with online posts calling her an exotic dancer and prostitute.

But more attention has been given lately to the digital fallout from the violence in Charlottesville, which has raised once more the question of what responsibility digital platforms have to tolerate offensive or hateful speech. The traditional First Amendment answer, of course, is “none,” see this recent decision from N.D. Cal., but that is unsatisfactory to many who perceive privately operated spaces on social media as the modern equivalent of the town square (one of many reasons why the Supreme Court’s recent decision in Packingham is so interesting).

There’s a danger when we celebrate hate sites like the Daily Stormer being chased to the hinterlands of the Internet without considering the ramifications, but there’s also a danger in depriving private actors of their ethical judgment in their role as mediators of information. Sometimes taking that role away is necessary, as in the case of telephone service and other common carriers, but one of the essential functions of the media has always been to moderate public discourse through editorial judgment. Perhaps the social benefits of the digital public sphere only arise if such moderation is carried out with an extremely light touch by digital platforms, but that does not necessarily mean that there cannot be a point even in digital space where a forum operator says “enough.”

**Terms of Service**

The Second Circuit handed app developers a big win, with a ruling upholding the arbitration clause in Uber’s terms of service for its smartphone app. Not uncommonly, the app combined registration for Uber’s services with agreement to the terms of service, giving comfort to app makers following that pattern. Ticketmaster also successfully defended its arbitration clause, in a suit filed in the Northern District of California.

Eric Goldman brings us a couple of other cases where judges have torn up digital contracts for glitches in notice and consent. Really, this isn’t that hard to get right; it’s just that
clients often balk at the necessary steps because they’re concerned about aesthetics or scaring people away with legal notices.

Miscellaneous

Here’s an issue I haven’t thought about for a while: Americans with Disabilities Act lawsuits against brick-and-mortar stores over their online websites. But it appears someone has been thinking along these lines, with dozens of lawsuits filed in recent months after a federal judge ruled in a Florida bench trial in June that retailer sites must be ADA-compliant. Most of the cases are in New York and California.

A pro se plaintiff’s demand for a preliminary injunction ordering Facebook, Yelp, and Twitter to reverse a ban on his use of their services failed in N.D. Cal., with the court rejecting the plaintiff’s claim that the First Amendment mandates access to social media due to the lack of state action. Still, between the language of the Supreme Court in Packingham and a recent high-profile argument attempting to apply California’s constitutional free speech provision to LinkedIn, this is a space to watch.

We have a pair of cases involving LinkedIn and non-solicitation agreements that reached different results (though logically so): A federal judge in D. Minn. held that a “blatant sales pitch” to an ex-employer’s customer could violate a non-solicitation clause, while an Illinois appellate panel held that merely requesting a connection or announcing a job change does not.

Zillow was let off the hook in N.D. Ill. for invasion of privacy and deceptive practices claims in connection with its publication of its “Zestimates” for real estate values, with the court holding that the estimates were clearly marked as such and not deceptive and that their publication did not constitute an unlawful intrusion under Illinois law.

A judge in E.D. Wis. enjoined Milwaukee County from enforcing an ordinance against operation of augmented reality videogames without a permit, finding the ordinance violated the First Amendment. Pokémon, Go! (But not all at the same time, please — the networks can’t handle it.)

A California court held that Apple could not be held liable for the death of a college student killed by a texting teen, finding that the company does not owe a duty of care to ensure that iPhone owners use their devices responsibly.

Finally, I’m going to break with my usual habit and talk about some non-U.S. cases because of their global ramifications for the Internet worldwide. Back in June, Canada’s Supreme Court ruled that it had extraterritorial jurisdiction to force Google to remove search results globally for products implementing allegedly stolen intellectual property. The Canadian
court did this, in part, based on findings that no country would protect such content and that measures such as geoblocking were insufficient. Google has filed a lawsuit in N.D. Cal. to block the enforcement of the global injunction in the United States, which could disprove at least part of the Canadian court’s premise (although a U.S. injunction will not affect penalties imposed in other countries, or protect U.S. corporate executives against the risk of contempt charges and arrest when they travel beyond our borders). Meanwhile, Google’s battle with French regulators over another global injunction has made its way up to the Court of Justice of the European Union, setting up a final showdown over how far Europe will attempt to extend its grasp. It’s anyone’s guess what happens in Europe, although deference to U.S. businesses and concepts of free speech have never been a matter of particular concern – even when the EU thought we had a sane president. It’s hard to see how this ends well.

Digital Privacy

Anonymity

So, concerned citizens have taken it upon themselves to “name and shame” those participating in the white supremacy demonstrations in Charlottesville, using Twitter and other platforms to crowdsources the effort based on photos of the event. I’m all for challenging people who voice repugnant ideas, and no doubt some of the participants will be identifiable, but there’s no better way to start a witch hunt than rallying folks to name Nazis in their backyard based on partial or blurry photographs. Indeed, at least two people were falsely named in the effort. Something similar happened after the Boston Marathon bombing, where Reddit users attempted to identify the attackers based on photographs taken at the explosion site; those efforts produced nothing except a lot of wheel spinning and false accusations.

In other news, the Ninth Circuit has decided that it will hear a challenge to a federal grand jury subpoena compelling Glassdoor to turn over user identities in a closed proceeding with a sealed docket and no amicus participation. This secrecy is deeply troubling, compounding concerns over a lower court decision ordering Glassdoor to comply based on the judge’s ruling that the First Amendment right to anonymity protects only political speech.

In Florida, the City of Coral Gables has launched a vindictive lawsuit against Facebook to identify users who “cast the city in a false light,” which is just so wrong that I…can’t…even. In New York, Tumblr has now released the identities of 300 users in revenge porn litigation. And remember that one-star review case in South Carolina that I mentioned up in the Defamation section? Well, naturally the plaintiff has sought the user’s identity from Google; Google has responded asserting the bleedingly obvious opinion defense on the user’s behalf.
**Hacking**

We have a major Computer Fraud & Abuse Act ruling from the Northern District of California, with the court holding that the CFAA does not prevent startup HiQ Labs from scraping publicly accessible information from LinkedIn. The court distinguished the Ninth Circuit’s decision in *Facebook v. Power Ventures* on the basis that Facebook had implemented a password scheme, while public LinkedIn information can be accessed without logging in, but the distinction doesn’t stand up to scrutiny because neither HiQ nor Power Ventures were accessing anything that users hadn’t given them permission to see. Really, the district court’s decision boils down to the judge’s sense that the CFAA can’t mean what LinkedIn claims it does. (The decision punts, however, on the possibly even more charged question of whether privately-operated digital forums are public forums under California’s state constitution, à la *Pruneyard*.)

A hacker has been arrested and is awaiting trial in W.D. Wash. for directing attacks at Leagle.com to coerce it to remove a link to information about his prior criminal case; similar attacks had also been directed at Fairfax Media, The Metro News, the Canadian Broadcasting Corporation, and Canada.com. HBO also suffered a substantial hack and ransom demand, with stolen files being posted to the Internet. I don’t know, *Game of Thrones* is going by so fast with this year’s short season that I can’t see wanting to get through it even more quickly.

Finally, the independent researcher credited with stopping the recent WannaCry ransomware attack has been charged in the Eastern District of Wisconsin with developing malware used by others to steal online banking and credit card data. It will be interesting to see whether the conspiracy charges hold up; without them, it’s tough to see how merely developing and distributing (but not using) malware is illegal.

**Control of Personal Information**

The Ninth Circuit has issued its opinion on remand from the Supreme Court in the Spokeo Article III case, finding that the plaintiff adequately pleaded injury to support standing based on his allegations that Spokeo provided incorrect information about him in its database. The Supreme Court’s decision was enough of a puzzler to courts, though, that we might see another attempt to take the case up.

The Ninth Circuit also affirmed an $8.5 million cy pres settlement in a case against Google for sharing users’ search terms with third parties in violation of its own privacy policy. In
N.D. Cal., Google has agreed to limit its scanning of user email for advertising purposes, in a proposed settlement of a class action, while Facebook has reached a final settlement on its data collection practices with respect to private messages.

In C.D. Cal., Vizio will face wiretapping claims based on allegations that its smart TVs surreptitiously collected data from users, after a judge rejected Vizio’s claim that the data collected was trivial on a motion to dismiss. Meanwhile, a mother in San Francisco is leading two putative class actions in N.D. Cal. against Disney and Viacom respectively, alleging that apps distributed by the companies collected data in violation of the Children’s Online Privacy Protection Act. In the same court, a judge has in part denied a motion to dismiss a massive data breach class action against Yahoo!, allowing it to move forward on contract, unfair business practice, and other related claims. And in E.D. Mo., the operators of cheating site Ashley Madison have agreed to pay $11.2 million to settle data breach lawsuits. Next problem: How to mail the checks without outing the recipients (cf. the Aetna case mentioned up in Privacy).

Finally, the FTC has received a couple of new complaints, one against Google over its efforts to connect data about users’ online and offline shopping practices, and one against popular virtual private network service Hotspot Shield, which is alleged to collect some data and intercept traffic.

_Trespass_

The creator of “Pokémon Go” has dodged a class action alleging that it is liable for inducing players to trespass on private property, for issues with defining the class and meeting the jurisdictional damages threshold.

_Encryption_

Here’s an interesting update on that Florida sextortion case we’ve mentioned in past issues: When the reality TV star and her boyfriend who were alleged to have attempted to sextorted a social media celebrity refused to unlock their smartphones, the FBI apparently showed up to lend a hand—going so far as to pay an Israeli forensics firm to hack the phone.

_Internet Surveillance_

The Department of Justice served a warrant on domain host DreamHost in D.C. Superior Court for all information about a website used to coordinate protests and disruption at the January inauguration of Donald Trump. The warrant was allegedly in support of investigation into illegal activity at the inauguration, but, despite the DOJ’s claim of no ill intent, the breadth of the data requested and the obvious potential for abuse of the data
for political purposes led to a widespread outcry. (I mean, Trump is now openly and directly undermining the Constitution by pardoning a former public official adjudged to have violated citizens’ civil rights, so let’s not pretend there’s a level to which he will not sink.) The court ultimately upheld the warrant, but strictly limited the data to be provided and how the DOJ is allowed to search and to use it.

A spyware warrant used by the FBI in its Playpen child porn investigation has reached a federal Court of Appeals for the first time; the Tenth Circuit upheld the “good faith” use of spyware by the government to hack computers, noting investigatory challenges in the digital age. On the other hand, the Eleventh Circuit indicated that the Fourth Amendment might impose special requirements for tailoring warrants when seeking material from a suspect’s Facebook account, preventing a wholesale grab of everything in the account. The D.C. Circuit held that police cannot seize all electronic devices in a home being searched without some ground to believe that they were connected to a crime. And the Supreme Judicial Court of Massachusetts ruled that digital phones cannot be searched without a warrant.

In E.D. Pa., a federal judge has adopted a magistrate’s ruling that the government can force Google to turn over information on foreign servers. In S.D.N.Y., yet another judge has held that no warrant is required to obtain historic cell site location data; a review of warrantless requests for cell site and Internet use in D.D.C. has revealed that the number of these requests septupled in three years. On the other hand, a judge in N.D. Cal. that the use of a stingray to obtain real-time cell location data does require a warrant. Again, all eyes are on the Supreme Court and Carpenter on these issues.

The bipartisan ECPA Modernization Act bill, which would require the government to obtain warrants to access data in cloud storage and emails and other material stored for more than 180 days, has been introduced yet again. In the last go-round, the bill was killed after amendments started to expand its reach in unwanted directions.

**Intellectual Property**

*Copyright – New Cases*

We saw a pile of new copyright-related suits from C.D. Cal. this time around, including:

- A Chinese video game studio sued for ripping of Riot Games’ “League of Legends,” in response to which the defendant threatened media outlets reporting on the lawsuit (sigh);
• Sony Pictures sued for the allegedly unauthorized use of T.Rex’s “Debora” in Baby Driver;
• Vanity Fair sued for its use of a photo of Marilyn Monroe’s legendary performance of “Happy Birthday”;
• Showtime filing suit to shut down pirate streams of the Mayweather-McGregor fight and scoring a TRO against more than 40 URLs – but the fight nevertheless racked up almost 3 million illegal viewers through almost 240 separate streams;
• A lawsuit against The Weinstein Co. over the film rights to Stephen King’s “Children of the Corn”;
• Penthouse Global Media suing a company that is allegedly serving up Caligula online along with warmed-over issues of Penthouse’s Omni magazine, with a side order of trademark infringement and a garnish of Jared Leto; and
• Usenet service provider Giganews suing defunct porn purveyors Perfect 10 for fraud, in connection with Giganews’ attempt to collect $5.6 million in attorneys’ fees after an earlier copyright suit by Perfect 10 collapsed.

We also had an amended complaint in the C.D. Cal. suit against Disney over Zootopia, with a screenwriter attempting to flesh out his complaint after an earlier dismissal without prejudice.

Atari is suing Nestlé in N.D. Cal. for use of its classic video game “Breakout” in an ad for Kit Kat bars, where the bricks were replaced with the candy. There’s a new battle between content aggregators in S.D.N.Y., with Distractify suing Brainjolt for lifting its ideas for collections of repackaged content, as content creators grin smugly at the irony. Marvin Gaye’s “Let’s Get It On” is at the center of another lawsuit in S.D.N.Y., this time with a claim that Ed Sheeran’s “Thinking Out Loud” crossed the line in its sampling of the Gaye standard. Netflix has been sued in E.D. Pa. for lifting content from a book on hazing at black fraternities for its film Burning Sands.

Spotify has been targeted with two new infringement suits in M.D. Tenn., one by songwriter Bob Gaudio of Frankie Valli and the Four Seasons and the other by rights administrator Bluewater Music. The case stems from, what else, an alleged failure to follow protocol on mechanical licenses; the plaintiffs apparently intend to opt out of an earlier class settlement on the issue.
We have a new case in S.D. Tex. from the world of networked set-top boxes, with Dish Network claiming that add-on digital service ZemTV allows owners of Kodi-powered STBs to view Dish channels without permission. The suit also alleges that TVAddons, an online library of Kodi add-ons, encouraged infringement by distributing ZemTV.

And in California, a lawyer who doesn’t want to be the next John Steele has sued his former partner and former clients for seducing him into the dark world of BitTorrent copyright trolling with false promises of untold riches. Um, good luck with that.

Copyright – Plaintiffs’ Victories

Bad times for VidAngel, the streaming service that offered sanitized versions of Hollywood hits suitable for family viewing; as you’ll recall, the company was hit by a huge infringement lawsuit brought by major studios which quickly resulted in a preliminary injunction. The Central District of California has now rejected VidAngel’s affirmative defense of copyright misuse, dismissed claims that the plaintiff studios engaged in an illegal boycott of doing business with the company, and denied the company’s attempt to evade the injunction with a modified version of the service. To top it off, the Ninth Circuit upheld the injunction.

Personally, I have enough trauma from those pre-VCR days when I was a kid and—like many children of that era, apparently—got confused as to which bits of Star Wars were in the movie versus the “Star Wars Storybook,” leading me to swear blind that the Biggs scene on Tatooine was in the theatrical version I saw at age five. The idea of intentionally subjecting children to bowdlerized versions of movies that won’t match what their peers see strikes me as gaslighting bordering on child abuse. And yes, of course films you see on regular TV have usually been “edited for content,” and I know that these days there’s no such thing as a “true” copy of a film, between theatrical releases, extended editions, special editions, director’s cuts, black & white versions, music remixes on the way to home media due to rights issues, deletion of some things that just weren’t a good idea (I’m looking at you, Pokémon, and you, Derpy Hooves), and dozens of other little changes that can be made without comment between releases. I get it. But on a philosophical level I still disagree with the Ninth Circuit that “Star Wars is still Star Wars, even without Princess Leia’s bikini scene.”

Speaking of child-safe versions, a judge in S.D.N.Y. ruled that picture book versions of classic novels from the likes of Jack Kerouac and Ernest Hemingway violated copyright, handing a win to the authors’ estates and their publishing houses. Also in S.D.N.Y., we had a trio of plaintiffs’ wins in photograph cases, with: a photographer reaching a settlement with Sean
“Diddy” Combs’s record company over the use of a photo of Combs on Instagram; Richard Prince’s fair use defense in another “appropriation art” case failing to persuade the court; and CBS losing a motion to dismiss in a lawsuit over the use of a photo of Ivanka Trump’s stalker in 48 Hours.

Online print shop Zazzle was whacked in C.D. Cal. for $460K over the infringement of copyrights in almost 40 paintings that the service made available for printing on mugs, tote bags, and other products. In N.D. Ill., a judge denied a motion to dismiss by the founder of KickassTorrents, who had argued that there is no such thing as criminal secondary infringement in the U.S.; perhaps, says the court, but we do have conspiracy to commit infringement. In E.D. La., Beyoncé is stuck for now defending a claim over the sampling of words spoken by the late Messy Mya in her song “Formation.” In N.D. Ohio, a New Yorker agreed to pay $21.3 million to end a claim by Getty Images that the man sold stolen login credentials leading to the infringement of Getty’s rights in thousands of photos. And in E.D. Va., a federal judge declined on a motion to dismiss to take up Warner Bros.’ argument that the Conjuring franchise was based on true facts over which the author of an allegedly infringed book could not assert copyright, deferring the issue until after discovery.

We also saw a rare copyright ruling against the United States, with the Court of Federal Claims denying a motion to dismiss filed by the U.S. Postal Service over a stamp design. It turns out the Post Office, in attempting to depict the Statue of Liberty, inadvertently depicted a copyrighted Las Vegas replica of the statue. Whoops.

Finally, in a prior issue, I mentioned a suit brought by Dish Network in M.D. Fla. against an Arabic pay-TV provider that was alleged to have pirated Dish’s signals. The defendant counterclaimed for conversion, trespass and breach of contract, claiming that Dish committed these torts when it hacked into one of the defendant’s set-top boxes to figure out where the defendant was getting its signals. The court granted Dish’s motion to dismiss, but without prejudice; while it seems unlikely that the plaintiff will be able to amend the pleading deficiencies, it does raise the interesting question of whether the forensic techniques used to identify infringement can themselves raise legal issues.

Copyright – Defense Victories

The Ninth Circuit rejected a screenwriter’s appeal of a decision below that the 2011 film Anonymous did not infringe his screenplay.
In S.D.N.Y., the Beatles’ Apple Corps Ltd. defeated a claim that the master tapes from the Fab Four’s legendary Shea Stadium performance belonged to the estate of the concert’s promoter, and the creators of a popular YouTube channel defeated a copyright suit over videos they published mocking a YouTube pickup artist on fair use grounds.

In E.D.N.Y., a judge harshly rebuked the attorneys who brought an infringement claim over an Ethiopian cookbook, telling them that devoting “20 minutes to legal research” would have revealed that the claim had no merit whatsoever. And what’s this? A claim for wrongful use of DMCA takedown notices has survived a motion to dismiss in M.D. Fla., in a case involving alleged use of copyright to censor criticism of a church.

Copyright – New & Pending Appeals

The Second Circuit heard argument in ReDigi’s case over the legality of a secondary market for digital music files in a marathon session that brushed on the metaphysics of continuity of existence and the difference between copying and transmission in digital space. (This is a conundrum familiar to anyone who has considered exactly how Star Trek’s transporters work.)

Naruto finally got his day in court before the Ninth Circuit, in a hearing that didn’t go particularly well for the crested macaque. The parties subsequently filed a joint motion to stay the appeal, with a settlement apparently in the offing. Also in the Ninth Circuit, Nike faced questioning on similarities between its “Jumpman” logo and a photographer’s image of an early career Michael Jordan in Life magazine.

Copyright – Miscellaneous

There was some additional weirdness around the Mayweather-McGregor fight...some streaming viewers were treated to glimpses of a series of numbers that appeared when the camera was off the action in the ring. The phenomenon is unexplained, but could constitute a form of digital watermarking to help identify the source of pirated streams.

Speaking of weird, how about the State Department, the IP Czar, the USPTO, and the U.S. Copyright Office teaming up with the MPAA, RIAA and Copyright Alliance to stage a “fake Twitter feud” over who loves intellectual property more? Or fifteen state AGs starting a video campaign against “content theft sites,” scaring viewers with the image of a hacker (complete with standard-issue black hoodie) ready to destroy their lives as soon as they click that download link?
In other news, we’ve discussed a number of recent court decisions limiting copyright remedies for pre-1972 sound recordings (a/k/a the “Flo & Eddie cases”). A new bipartisan bill wants to bring those recordings into line with other music under the Copyright Act, at least as far as mechanical licenses go.

**Patent**

The Federal Circuit has, perhaps once and for all, killed that podcasting patent that the Electronic Freedom Foundation has been fighting for years; the Court of Appeals upheld a PTAB ruling on invalidity.

Fox, Paramount, and Disney are facing infringement lawsuits in N.D. Cal. over their use of certain facial motion capture technology in major Hollywood blockbusters and video games. The studios acquired the technology from companies that, it turns out, did not have the right to sell it – or at least that was the conclusion of a judge in N.D. Cal. after a bench trial between the parties who sold the tech and the party claiming to be the real owner. The claims against the studios also seek injunctions against distribution of the films made with the technology, making these cases ones to watch.

Oh, Trump appointed Irell & Manella attorney Andrei Iancu to be the new head of the USPTO.

**Commercial Speech**

**Trademark**

Well, Matal v. Tam might have held that it is unconstitutional to ban federal registration of disparaging marks, but the Federal Circuit is still debating the USPTO ban on “scandalous” or “immoral” marks in a case over the attempted registration of FUCT for clothing. The Federal Circuit also rejected Black Eyed Peas frontman will.i.am’s attempt to register “I Am” as a trademark for accessories and cosmetics, because other brands had beaten him to the punch.

Divert warp power to the shields, Mr. La Forge: LeVar Burton has been accused of infringing trademarks associated with Reading Rainbow in a new podcast, according to a suit filed in S.D.N.Y. by the New York public broadcaster that owns the brand. (Late-breaking update: As befits a Starfleet officer, Burton has apparently peacefully resolved his conflict through negotiation and settlement.) [Photo: CC BY 2.0 Florida Supercon]
Also in S.D.N.Y.: Viacom is also facing a trademark suit over the Funny or Die show Throwing Shade. The name allegedly infringes a registered trademark for THROWIN SHADE held by a New Jersey man for his TV pilot, which documents LGBTQ ball culture; the irony that the complaint casts significant aspersions on the quality of the Funny or Die show is not lost on this reader.

Another new case in S.D.N.Y. pits robots versus superheroes as Hasbro (on behalf of the Transformers) sues DC Comics and Warner Bros. (on behalf of the Justice League) over who gets to use the name “Bumblebee” in connection with children’s toys. Sure, the DC Comics character predated the robot who sometimes chooses to go about as a VW Beetle by about six years, but this is about the merch. I don’t know, though, I have a hard time seeing even small children thinking there is a relationship between these two things:

At least, for the good of the species I hope they wouldn’t.

Turning to other matters, what’s the Trademark section these days without a few battles over classic band names? In Cal. Super., we have a new case involving the Kingston Trio, which believe it or not is still touring in some manifestation; actually, two manifestations, which is precisely what’s at issue here. Meanwhile, in N.D. Cal. a former lead guitarist of Jefferson Starship will be allowed to proceed on a claim that other members of the group used the band name in violation of a contract between them, and will be given a chance to replead his claim that they deceived the public by using his personal name in promotional materials.

Zazzle might have been whacked with a copyright judgment, but print-on-demand service SunFrog has trademark woes after it was hit with a preliminary injunction in E.D. Wis. to stop its production of merchandise bearing Harley-Davidson marks and to stop using the marks in its
domain names and keywords. Eric Goldman has a good breakdown of the decision; he also calls out the foolishness of a ruling from N.D. Ind. finding potential initial interest confusion from the use of white-on-white text to hide metatags.

Finally, the term “Universal” was held to be generic for churches by a judge in the Southern District of New York.

A battle rages on in the orbit of the Eastern District of Pennsylvania over ownership of the BUCK ROGERS trademark. A summary judgment ruling in the case reached the truly shocking conclusion that Buck Rogers is not famous enough to be the subject of a trademark dilution claim, which just goes to show that we are failing our children as a culture. (And don’t get me started on the fact that the same survey showed Buck Rogers to be better recognized than the Doctor – had the survey asked about “Doctor Who,” I’m sure there would have been a different result. Philistines.)

Restricted Subject Matter

Former Fox News contributor Tobin Smith has been held in civil contempt in D.D.C. for violating the terms of a final judgment barring him from promoting penny stocks and requiring him to pay $183K in fines.

False Advertising

So, yeah, the much-ballyhooed Chicago launch of Pokémon Go’s new Raid battles (where a whole crowd of players, smartphones in hand, can team up to defeat a giant Pokémon in public parks and the like) was a bust due to bandwidth limitations rendering the game unplayable. As a result, a class action was filed in Illinois state court against the creator of the game (and host of the event) for inducing players to expend significant sums to attend.

Speaking of connection issues, a new lawsuit against Showtime in the District of Oregon alleges that the network misled viewers as to the quality of digital streaming of the Mayweather-McGregor fight. The $99.99 streams were allegedly subject to extensive problems with delays, grainy video, and buffering events.
Oh, and quick – name two James Bond films you wouldn’t expect to see in a boxed set advertised as “All the Bond films gathered together for the first time.” If you immediately answered Never Say Never Again and the David Niven version of Casino Royale, then you (1) are the kind of person who might buy such a boxed set and (2) wouldn’t be surprised (disappointed, perhaps, but not surprised) at the fact that those two films weren’t included. Still, a judge in W.D. Wash. held that this was potentially misleading enough for a claim against MGM Studios to proceed. And if you’re reading this and thinking, “Wait a minute...David Niven?,” then you’re better off not knowing.

A class action against Spotify over auto-renewals at the end of a trial period faltered in N.D. Cal., when it was discovered that the lead plaintiff apparently liked the service enough to keep using it after the trial ended. Meanwhile, the FTC’s $4 billion false advertising case against DirecTV is on the rocks after the judge stayed the case mid-trial so the parties could brief whether the agency’s evidence was sufficient to make it to judgment.

A judge in S.D.N.Y. held that while the conclusions of scientific studies might be more like opinions than facts, it is still possible to state a false advertising claim by alleging factual misrepresentation of the results of a study.

Lastly, the much-mocked Subway foot-long litigation has finally fallen short, with the Seventh Circuit not only reversing the district court’s approval of a settlement but dismissing the case entirely. The panel was unimpressed with the case, to say the least, calling it a meritless lawsuit that was intended to benefit the attorneys rather than the class of plaintiffs and “no better than a racket.”

**Product Disparagement**

The Fourth Circuit held that a non-profit egg certification company’s promotions to retailers, which included allegedly false statements about an egg farm, constituted commercial speech.

**Professional Speech**

The last phase of “Docs vs. Glocks” is upon us: The State of Florida has agreed to shell out $1.1 million in attorneys’ fees after a controversial law banning doctors from discussing guns with their patients was struck down by the Eleventh Circuit as unconstitutional.

In the District of Utah, a law firm has sued the Utah State Bar to resolve a dispute as to whether their radio advertising is in violation of rules of conduct. Over in the Eighth Circuit, the
Court of Appeals ruled that a North Dakota attorney did not have a First Amendment claim based on mandatory bar dues used to support political activity with which he did not agree.

**Time, Place & Manner Regulations**

The Eleventh Circuit struck down a handbilling ordinance in Miami Beach, finding that in attempting to address the annoyance of sidewalk greeters the city had failed to consider less burdensome alternatives to a complete ban. Meanwhile, a federal judge in N.D. Ill. denied the City of Chicago’s motion to dismiss a case alleging that its ban on advertising and entertainment in cars used by rideshare services violated the First Amendment.

**Miscellaneous**

**Academia**

Rhode Island has joined the ranks of states with student press freedom laws, while Texas failed to pass a campus free speech bill, which died in committee.

**Government Licensing & Public Fora**

The First Circuit upheld a content-neutral Maine law banning outdoor protests loud enough to be heard inside a building, and vacated an injunction obtained by an anti-abortion protester against enforcement of the law. Meanwhile, the Eighth Circuit upheld Nebraska’s funeral picketing law against a legal challenge by the Westboro Baptist Church, finding that the law’s content-neutral 500-foot buffer zone struck a proper balance.

In D.D.C., the ACLU has filed a First Amendment suit on behalf of a number of parties against the Washington Metropolitan Area Transit Authority over its ban on “issues-oriented” advertising on public transit – including an ACLU ad containing the text of the First Amendment itself.

**Political Speech**

The D.C. Circuit held that the non-profit Commission on Presidential Debates was not a state actor, and could exclude debate participants without violating their First Amendment rights; to the contrary, said the court, forcing the Commission to include candidates would infringe its own speech rights.
Threats, Intimidation, and Coercion

The Third Circuit revived a retaliation claim brought by former state officials against former Pennsylvania AG Kathleen Kane, finding that the plaintiffs had adequately pleaded threats to impugn their character in retaliation for exercise of their First Amendment rights.

A Massachusetts appellate panel flipped a defendant’s conviction for threatening the chief of police and deputy chief of the town of Milford, finding that a series of seventeen Facebook videos did not arise to the level of “true threats.” Also in Massachusetts, the woman who urged her boyfriend to commit suicide via text was sentenced to 15 months, but the sentence was stayed to allow an appeal given the significant free speech issues in the case.

Although a judge in W.D. Ky. allowed a case against Donald Trump for inciting violence at his campaign rallies to proceed, he has now certified that ruling for an interlocutory appeal.

Hollywood Hijinks

In California Superior Court, a judge ruled that Univision’s development of a documentary series about the late singer Jenni Rivera was not eligible for anti-SLAPP protection against a claim that the network induced a participant in the series to breach a non-disclosure agreement. The court held that while routine news reporting might be protected against such a claim, Univision’s project did not fall in that category.

Books & Publishing

Milo Yiannopoulos filed suit in New York against Simon & Schuster for cancelling its publishing contract with him in the wake of reports that Yiannopoulos had condoned pedophilia, seeking $10 million in damages. In N.D. Ind., a judge denied a lawyer’s motion to dismiss a malpractice case filed by author and ex-Navy SEAL Matthew Bissonnette, who alleged the attorney’s bad advice led to a host of legal and personal woes in connection with the publication of a book about the death of Osama bin Laden. Tom Clancy’s widow has filed a case in Maryland state court in an attempt to establish her ownership of the character of Jack Ryan, based on her interpretation of assignment agreement. And at the very end of August, a trial between John Steinbeck’s heirs over control of the literary and film rights to his work began in N.D. Cal., the latest iteration of a decades-long running battle.

The True Miscellany

Ah, Martin Shkreli. How bitter you must be that someone else has seized the Bernie Madoff Trophy for most reprehensible businessperson. Your last-ditch bid for the crown,
involving an attempt to buy up domain names containing the names of journalists in order to hold them for ransom, was fairly pathetic.

**Conclusion**

And with that, Summer 2017 officially comes to a close for the *Monthly Daily*. We’re now headed into the fall events season here at the MLRC, so we’ll look forward to seeing you in London, at the MLRC Forum and Annual Dinner, and more.

Have a fantastic Labor Day, everyone!